(6)

Command:[

Last page of docket
SHOW PROCEEDINGS AND ORDERS DATE: [10/17/88]

CASE NBR: [88-DB138] CFX STATUS: 1

SHORT TITLE: [Rhodes, James, et al. -
VERSUS [Stewart, Larry] DATE DOCKETED: [072388]

PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Jul 22 1988		Petition for writ of certiorari filed.
Aug 22 1988		Brief of respondent Larry Stewart in opposition filed.
Aug 24 1988		DISTRIBUTED. September 26, 1988
Sep 30 1988		REDISTRIBUTED. October 7, 1988
Oct 11 1988		REDISTRIBUTED. October 14, 1988
Oct 17 1988		Petition GRANTED. Judgment REVERSED. Dissenting opinion by Justice Marshall. Dissenting opinion by Justice Blackmun with whom Justice Brennan joins. Opinion per curiam.

1AV

88-139

Supreme Court, U.S.
FILED
JUL 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES A. RHODES, et al.,

Petitioners,

v.

LARRY STEWART,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ANTHONY J. CELEBREZZE, JR.
Attorney General

ALLEN P. ADLER
Counsel of Record

Assistant Attorney General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED

I. **IS AN AWARD OF ATTORNEYS' FEES MADE TO A PLAINTIFF PURSUANT TO 42 U.S.C. SECTION 1988 PROPER WHERE THE PLAINTIFF HAS RECEIVED NO RELIEF?**

PARTIES

The petitioners in the action are James A. Rhodes, the former governor of the State of Ohio, George F. Denton, the former director of the Ohio Department of Rehabilitation and Correction and Ted Engle, former superintendent of the Chillicothe Correctional Institute (CCI). The respondent is Larry Stewart, a former prisoner of the State of Ohio.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	i
DECISIONS BELOW	iv
JURISDICTION	iv
STATUTORY PROVISION INVOLVED	v
STATEMENT OF THE CASE	1
ARGUMENT IN SUPPORT OF GRANTING CERTIORARI	4
CONCLUSION	8
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

Cases	Page
Ashcroft v. Mattis, 431 U.S. 171 (1977)	6
Coen v. Harrison County School Board, 638 F.2d 24 (5th Cir. 1981)	6
Hensley v. Eckerhart, 461 U.S. 424 (1983)	4
Hewitt v. Helms, 482 U.S. ____, 96 L.Ed.2d 654, 107 S.Ct. 2672 (1987)	4, 5, 6
National Coalition Against the Misuse of Pesticides v. Thomas, 828 F.2d 42 (D.C. Cir. 1987)	6
Powe v. City of Chicago, 664 F.2d 639 (7th Cir. 1981)	6
Rhodes v. Stewart, 461 U.S. 952 (1983)	4
Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980)	6
Weinstein v. Bradford, 423 U.S. 147 (1975)	6

DECISIONS BELOW

The decisions of the United States Court of Appeals for the Sixth Circuit are unreported. (A-4 and A-22). The decisions of the United States District Court for the Southern District of Ohio, Eastern Division are unreported. (A-15 and A-38). The decision of the Supreme Court of the United States. (A-21) was reported as *Rhodes v. Stewart,* 461 U.S. 952 (1983).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered April 27, 1988. Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

This case involves 42 U.S.C. Section 1988:

Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statute of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

IN THE
SUPREME COURT of the UNITED STATES

October Term, 1987

JAMES A. RHODES, et al.,

Petitioners,

v.

LARRY STEWART,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners James A. Rhodes, George F. Denton and Ted Engle respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 27, 1988.

STATEMENT OF THE CASE

This case originated with the filing of a complaint in the United States District Court for the Southern District of Ohio, Eastern Division on January 17, 1978. (A-51). The case was assigned number C-2-78-36. Following the filing of an answer, certain stipulations of fact were made and the case

briefed. A decision was reached, based on the briefs and stipulations, on February 23, 1981. (A-38). The opinion and order were amended twice. (A-33 - A-37).

On June 4, 1981, following an application and response, counsel for the plaintiffs were awarded attorneys' fees. (A-26).

The action was instituted by two inmates of the Chillicothe Correctional Institute (CCI), under 42 U.S.C. Section 1983, claiming they had been denied their rights under the First Amendment to the Constitution of the United States to receive "Hustler Magazine". (A-53).

Ohio prisoners were originally denied access to "Hustler" in May, 1976 pursuant to former Administrative Regulation 814. (A-40). It was never proved, stipulated or found that the plaintiffs, Larry Stewart and Albert Reese, appealed the ban on "Hustler" through proper administrative channels.

In December, 1976, the Ohio Department of Rehabilitation and Correction adopted Ohio Administrative Code Section 5120-9-19. The regulation was adopted in compliance with an order of the United States District Court for the Northern District of Ohio, Western Division in *Taylor v. Perini,* 413 F. Supp. 189, 214 (N.D. Ohio 1976). Section 5120-9-19 became effective on January 1, l977. The regulation sets forth the criteria by which printed material may be banned from Ohio's prisons as well as the steps necessary to appeal a decision to ban a particular publication. The regulation replaced former A.R. 814.

The plaintiffs allegedly made their desire to receive "Hustler" known, for the first time, to unnamed employees of CCI in June 15, 1977. (A-52). Those unnamed and unknown CCI employees were never made parties to the suit. The plaintiffs never made their desires known to any of the three named defendants. The plaintiffs never appealed the ban on the magazine pursuant to Section 5120-9-19. None of the defendants were aware of the plaintiffs' desires or that their employees had allegedly denied the plaintiffs' requests.

On January 17, 1978, one year after Section 5120-9-19 had gone into effect, and without attempting an administrative appeal, the plaintiffs filed suit in the district court requesting injunctive relief. (A-54).

Mr. Stewart was paroled on March 15, 1978. Stewart was given a final release from parole on January 17, 1980. Stewart has not been re-imprisoned in Ohio.

Mr. Reese died on February 18, 1979.

The district court entered its judgment on April 2, 1981 (A-35); more than three years after Stewart's parole and two years after Reese's death. The district court found Section 5120-9-19 to be constitutional and instructed the plaintiff to appeal the decision to ban "Hustler Magazine" pursuant to Section 5120-9-19(F) and (G). (A-33). As a result of the order of February 23, 1981 and its amendment, the plaintiff is now in the same position he was in on the date he filed suit; i.e. he has a right to appeal the ban of the magazine pursuant to a constitutional regulation. However, since Stewart was released three years before the order, he has failed to appeal. No inmate of any Ohio prison has sought permission to receive "Hustler" since January 1, 1977.

The district court awarded attorneys' fees of $5,325.85 to plaintiff's counsel on June 3, 1981, finding that the plaintiff had prevailed. The award was made pursuant to 42 U.S.C. Section 1988. The defendants appealed the award of attorneys' fees to the United States Court of Appeals for the Sixth Circuit as case no. 81-3395. The award of attorneys' fees was upheld (A-23) and a petition for rehearing was denied. (A-22).

A petition for a writ of certiorari was filed as case no. 82-1335. On May 31, 1983, the petition was granted and the judgment was vacated and remanded to the appellate court. (A-21). *Rhodes v. Stewart,* 461 U.S. 952 (1983). The appellate court remanded the case to the district court on October 28, 1983.

The issue of attorneys' fees was again briefed and Mr. Stewart was again awarded attorneys' fees on July 25, 1986. (A-15). A motion to alter or amend the judgment was made on August 1, 1986 and denied on May 18, 1987.

A notice of appeal was filed on June 8, 1987 and the appeal was assigned case no. 87-3542. On April 27, 1988, following briefing and argument, the award of attorneys fees was upheld, Guy, J., dissenting, by the United States Court of Appeals for the Sixth Circuit. (A-4).

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

A. Conflict With Decisions of This Court

The opinion of the court of appeals and the district court are in direct conflict with the decisions in *Hensley v. Eckerhart,* 461 U.S. 424 (1983) and *Hewitt v. Helms,* 482 U.S. ____, 96 L.Ed.2d 654, 107 S.Ct. 2672 (1987). The decision also ignored the mandate to reconsider the award of attorneys' fees in light of the *Hensley* decision *Rhodes v. Stewart,* 461 U.S. 952 (1983).

It was held in *Hensley* that plaintiffs prevail when ". . . they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Id.,* at 433.

The definition of "prevailing party" was further refined in *Hewitt.* It was held that "(r)espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Id.* at 661. The plaintiff here, like Helms, obtained, at best, a

favorable judicial statement.[1] He obtained no benefit or relief from the decision. The *Hewitt* decision went on to discuss the value of a favorable judicial statement:

> The Court of Appeals held, and Helms argues here, that the statement of law in *Helms I* that Helms disciplinary proceeding was unconstitutional is a "vindication of . . . rights," Brief for Respondent 19, that is at least the equivalent of declaratory relief, just as a monetary settlement is the informal equivalent of relief by way of damages. To suggest such an equivalency is to lose sight of the nature of the judicial process. In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces — the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought through the court, but from the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement — what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion — is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff.

Id. at 661-662.

Mr. Stewart, like Helms, did not achieve the ends of his litigation; he got nothing from the defendants; and nothing in the district court's decision altered the behavior of the defendants. Stewart did not administratively appeal the

[1] Whether Stewart received a "favorable judicial statement" is questionable. The district court directed Stewart to perfect his appeal in accordance with the existing regulation (A-31, A-33, A-37, A-46 - A-47). Could the defendants appeal a decision that their regulation was constitutional or an order that they and the plaintiff follow the administrative procedure they themselves had established?

decision to ban "Hustler." Stewart obtained no relief, because, on the day the district court entered its opinion, Stewart's claim had been moot for more than three years. It has been moot since his release from prison. *Hewitt,* at 660, 661, 663.[2]

B. Conflict With Other Circuits

The decision of the appellate court in this matter is not only in conflict with decisions of this Court, it also conflicts with the decision of at least one federal court of appeals. In *National Coalition Against the Misuse of Pesticides v. Thomas,* 828 F.2d 42 (D.C. Cir. 1987), it was held that a plaintiff must obtain the actual benefit sought in his suit. Nothing less than attaining the objective of the litigation makes the plaintiff the prevailing party for the purpose of awarding attorneys' fees. It was specifically held, citing *Hewitt, supra,* that a favorable judicial declaration does not confer the right to attorneys' fees.

In their last petition for certiorari, the respondents demonstrated that, prior to the *Hewitt* decision, several appellate courts required that awards of attorneys' fees be based on findings that plaintiffs had succeeded on the central issues of their actions. *See Powe v. City of Chicago,* 664 F.2d 639 (7th Cir. 1981); *Coen v. Harrison County School Board,* 638 F.2d 24 (5th Cir. 1981); *Smith v. University of North Carolina,* 632 F.2d 316 (4th Cir. 1980).

C. Importance of the Issue

Decisions involving the award of attorneys' fees have resulted in a variety of conflicting decisions. The rates have varied widely; there exists no rule for determining the number of hours that should be compensated for performing similar

[2] Because the entire claim was moot on April 1, 1981, the district court lacked jurisdiction to make an order. Ashcroft v. Mattis, 431 U.S. 171 (1977); Weinstein v. Bradford, 423 U.S. 147 (1975).

tasks; and, apparently, the definition of "prevailing party", set down in *Hewitt,* is being ignored. This case presents an excellent vehicle for this Court to more firmly establish the rule set down in *Hewitt.* Attorneys' fees cannot be awarded to a plaintiff who has not achieved his ends.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General

ALLEN P. ADLER
COUNSEL OF RECORD
Assistant Attorney General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition for Writ of Certiorari have been served on the respondent by forwarding such copies by regular U.S. Mail to Lyman Brownfield, Brown & Cramer, 250 East Broad Street, Columbus, Ohio 43215 this _____ day of July, 1988. I further certify that all parties required to be served have been served.

ALLEN P. ADLER
Assistant Attorney General

Case No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAMES A. RHODES, et al.

Petitioners,

vs.

LARRY STEWART,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

INDEX

PAGE

Order, April 27, 1988,
USCA/6th Circuit,
affirming grant of attorneys' fees A-4

Opinion and Order, July 25, 1986,
USDC/S.D. Ohio,
grant of attorneys' fees..... A-15

Order, May 31, 1983,
U.S. Supreme court,
reversal and remand of
award of attorneys' fees (461 U.S. 952) A-21

Order, November 9, 1982,
USCA/6th Circuit,
denying petition for rehearing A-22

Order, May 25, 1982,
USCA/6th Circuit,
affirming grant of attorneys' fees A-23

Judgment, June 4, 1981,
USDC.S.D. Ohio A-26

Memorandum and Order,
June 3, 1981, USDC/S.D. Ohio
grant of attorneys' fees..... A-27

Amended Judgment,
May 19, 1981, USDC/S.D. Ohio A-31

Amendment to Order,
May 18, 1981, USDC/S.D. Ohio A-33

Judgment,
April 2, 1981, USDC/S.D. Ohio A-35

Order,
April 1, 1981, USDC/S.D. Ohio A-37

Opinion and Order,
February 23, 1981, USDC/S.D. Ohio A-38

Answer,
March 15, 1978..... A-48

Complaint,
January 17, 1978 ..... A-51

No. 87-3542

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LARRY STEWART, *Plaintiff-Appellee,*	:	
v.	:	ON APPEAL FROM THE UNITED STATES DISTRICT
JAMES RHODES, GEORGE F. DENTON, and TED ENGLE, *Defendants-Appellants.*	:	COURT FOR THE SOUTHERN DISTRICT OF OHIO
	:	FILED APRIL 27, 1988

BEFORE: JONES and GUY, Circuit Judges; and CONTIE, Senior Circuit Judge.

PER CURIAM. The defendants-appellants, James Rhodes, George Denton and Ted Engle, appeal an award of attorney's fees first made on June 3, 1981 by the United States District Court for the Southern District of Ohio. The district court held that Larry Stewart, the plaintiff-appellee, was a "prevailing party" and therefore, pursuant to 42 U.S.C. Section 1988, entitled to attorney's fees.

Appellants challenged this award on successive judicial levels. The Sixth Circuit Court of Appeals affirmed the lower court's judgment on May 25, 1982. On May 31, 1983, however, the United States Supreme Court vacated the judgment and remanded the case to us for further consideration in light of *Hensley v. Eckerhart,* 461 U.S. 424 (1983). Upon our remand, the district court, on July 25, 1986, again determined that Stewart was a prevailing party and entitled to attorney's fees. Appellants now challenge that decision. For the following reasons, we find the appellants' claims without merit and therefore affirm the district court's judgment.

I.

The plaintiff-appellee, Larry Stewart, and Albert Reese, former Ohio prisoners, made their first request to receive "Hustler" magazine on May 1, 1976, while imprisoned at Chillicothe Correctional Institute in Chillicothe, Ohio. They were, however, denied access to the magazine by prison officials. In December 1976, approximately seven months later, the Ohio Department of Rehabilitation and Correction adopted Administrative Regulation 5120-9-19. This regulation established criteria for prison officials to refer to in deciding whether to ban printed material from Ohio's prisons and also set forth procedures for prisoners to follow to appeal such a ban. Following the adoption of this regulation, on June 15, 1977, Stewart and Reese again requested and were denied permission to receive "Hustler" magazine. The proper criteria was not applied by the prison officials nor were the proper procedures for an appeal followed by Stewart and Reese.

On January 17, 1978, Stewart and Reese filed a 42 U.S.C. Section 1983 action. They requested the district court to declare the acts, policies, and procedures of the appellants as violative of their constitutional rights. They also requested a preliminary and permanent injunction which would allow them to receive "Hustler" magazine and would prohibit any retaliation against them for bringing their action.

The case was first decided by the district court on April 2, 1981. Neither Stewart nor Reese, however, was incarcerated at that time. Stewart was paroled on March 15, 1978 and given a final release from parole on January 17, 1980. Reese died on February 8, 1979. The issue of mootness, however, does not appear to have been raised at the trial court level. The opinion itself suggests that the court was unaware that Stewart and Reese were no longer incarcerated. In rendering his decision, Judge Duncan specifically stated:

> [T]he plaintiffs are inmates at the Chillicothe Correctional Institute in Chillicothe, Ohio, in

> custody of the Department of Rehabilitation and Corrections of the State of Ohio.

J. App. at A9.

Although the district court did not order the injunction requested by Stewart and Reese, it did determine that Stewart and Reese's constitutional rights had been violated. The court determined that the appellants did not provide notice, an opportunity to be heard and an ultimate determination by a disinterested decision-maker. The district court ordered application of the procedural and substantive safeguards established by the courts and Administrative Regulation 5120-9-19. Following the original hearing, the district court awarded attorney's fees and expenses to Stewart pursuant to 42 U.S.C. Section 1988.

II.

In reviewing this decision, we look to the governing statute, 42 U.S.C. Section 1988 (1982), for guidance. The statute provides that in federal civil rights actions "the court, *in its discretion,* may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (emphasis added). This language has prompted many courts, including this one, to review a lower court's determination under this statute pursuant to an abuse of discretion standard. *See, e.g., Louisville Black Police Officer's Organization v. City of Louisville,* 700 F.2d 268, 273-74 (6th Cir. 1983).

III.

The appellants claim that the district court abused its discretion in two instances. They argue that Stewart is not a prevailing party because his claim was moot prior to the time a judgment was received. They also claim that Stewart received insufficient relief to fall within the category of "prevailing party." Both claims are without merit.

A.

Mootness does not preclude a finding that Stewart is a prevailing party and thus entitled to attorney's fees under Section 1988. Indeed, this court has previously made such a determination in a 1974 attorney's fees case. In *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974), *cert. denied*, 422 U.S. 1048 (1975). Attorney's fees were awarded by this court in a shareholder derivative suit which was dismissed as moot after the trial but before adjudication. In rendering its decision, this court stated: "[T]he fact that these suits became moot does not preclude a recovery of attorneys' fees. So long as a substantial benefit is conferred upon the corporation, it is not necessary that the litigation be brought to a successful completion." *Ramey*, 508 F.2d at 1196.

The Fifth Circuit Court of Appeals cited our decision in *Ramey* for support of its decision in a Section 1988 attorney's fees case. The court stated:

> [A] determination of mootness neither precludes nor is precluded by an award of attorneys' fees. The attorneys' fees question turns instead on a wholly independent consideration: whether plaintiff is a "prevailing party."

Doe v. Marshall, 622 F.2d 118, 120 (5th Cir. 1980), cert. denied, 451 U.S. 993 (1981).

The Ninth Circuit Court of Appeals also took a similar position regarding the award of attorney's fees in a civil rights action. The court stated: "Claims for attorneys' fees ancillary to the case survive independently under the court's equitable jurisdiction, and may be heard even though the underlying case has become moot." *Williams v. Alioto*, 625 F.2d 845, 848 (9th Cir. 1980), *cert. denied*, 450 U.S. 1012 (1981). The *Williams* court also relied upon the fact that the plaintiff had obtained a judicial determination that the defendants had acted unconstitutionally as further justification to award the attorney's fees. *Williams*, 625 F.2d at 848.

Thus, it is clear that once a district court has entered judgment and awarded attorney's fees, mootness should not, and, in this circuit, cannot defeat the award. Thus, although the appellants are free to claim that the district court's order that certain procedural and substantive safeguards be followed is moot, the award of attorney's fees, as an ancillary issue, stands.

B.

Furthermore, the definition of a prevailing party as defined by *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and as further refined by *Hewitt v. Helms*, 107 S. Ct. 2672 (1987), does not preclude a finding that Stewart is a prevailing party and thus entitled to attorney's fees.

The *Hensley* Court defined a prevailing party as one who succeeds "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." *Hensley*, 461 U.S. at 433 (citation omitted). While it is true that Judge Duncan's order requiring the appellants to comply with the requirements of due process - notice, an opportunity to be heard and a disinterested decision-maker - was only one of two judgments sought by Stewart and Reese, it clearly comprised a significant portion of the benefit which they sought.

The *Hewitt* Court, however, did place a further restriction on the definition of prevailing party. That Court held that a judicial statement that the plaintiff had suffered a denial of due process did not constitute sufficient relief to make the plaintiff a prevailing party. However, the *Hewitt* Court specifically stated that, in that case, "[n]o injunction or declaratory judgment was entered in [the plaintiff's] favor." *Hewitt*, 107 S. Ct. at 2675. The district court in this case, however, did enter such a judgment in Stewart's favor. *See* J. App. at A23.

An apparent conflict is seemingly created by the *Hewitt* Court's statement that "[t]he real value of [a] judicial

pronouncement . . . is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*" *Hewitt,* 107 S. Ct. at 2676 (emphasis in origina). Because neither Stewart nor Reese was incarcerated at the time of the judgment, the appellants' behavior toward Stewart and Reese was seemingly not changed. However, a consideration of the *Hewitt* Court's focus on the form of the ruling resolves this conflict. The *Hewitt* Court stated that "[t]he most [the plaintiff] obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim. That is not the stuff of which legal victories are made." *Hewitt,* 107 S. Ct. at 2675. However, if the *Hewitt* Court had found that the plaintiff had received a judgment rather than an interlocutory ruling, its inquiry would have ended and its decision would have been different.

In this case, Stewart received more than an interlocutory order. The order for the prison officials to comply with constitutional due process was in the form of a final judgment by the district court. This fact forestalls a determination that the judicial pronouncement has no real value.

Although Stewart was no longer in prison when his case was heard, he nevertheless received some of the benefit he originally sought. Stewart is a prevailing party as the result of the district court's judgment directing the appellants to comply with the constitutional requirements of notice, opportunity to be heard and an ultimate determination by a disinterested decision-maker. Accordingly, the district court did not abuse its discretion by awarding attorney's fees.

Therefore, for the foregoing reasons, the lower court's judgment is hereby AFFIRMED.

Guy, Circuit Judge, dissenting. Since I find an award of attorneys' fees to be inappropriate here, I dissent from the conclusion reached in the majority opinion.

I.

On March 15, 1978, less than sixty days later this suit was filed, plaintiff Stewart was paroled. He was given a final release from parole on January 17, 1980, and has never been reimprisoned in Ohio.

On February 18, 1979, thirteen months after this litigation commenced, co-plaintiff Reese died. There has never been any substitution of parties following Reese's death.[1] On April 2, 1981, the district court, on the basis of a set of stipulated facts filed in 1978, granted a judgment. The judgment was subsequently amended on May 19, 1981, and reads in pertinent part:

> IT IS ORDERED AND ADJUDGED THAT: the Court orders the defendants, upon request by the plaintiff or any prisoner of the State of Ohio, to conduct a hearing at which the prisoner or his representative will appear and be heard concerning his wish to receive *Hustler,* the person requesting the hearing will be joined as a party plaintiff in this case, to submit the question anew for a determination and to allow for a disinterested final

---

[1] Fed. R. Civ. P. 25(a)(1) provides in relevant part:

> If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. . . . Unless the motion for substitution is made not later than 90 days after the death is suggested . . . the action shall be dismissed as to the deceased party.

We need not decide whether Reese's death in and of itself extinguished his claim since it is clear that by failure to comply with Rule 25, the action must be dismissed as to Reese.

> decisionmaker to determine whether *Hustler* may lawfully be barred from the prison. The defendants may use the procedures outlined in 5190-9-19(F) and (G) in implementing this order.
>
> Any decision to censor the publication at the institution must be made for reasons that are consistent with penological objective as stated in *Pell v. Procunier, supra; Guajardo v. Estelle, supra,* and this opinion.
>
> The defendants are ordered to hold a hearing and render a decision within thirty (30) days of the date of the request.

(Appendix 23).

Plaintiffs then moved for attorney fees and, by judgment entered June 4, 1981, the district court awarded $5,306.25. Defendants appealed from the award of attorney fees only and this court affirmed the award in an unpublished order (No. 81-3395) dated May 25, 1982. Defendants then filed a petition for a writ of certiorari with the Supreme Court and, on May 31, 1983, the petition was granted and the judgment was vacated and remanded for further consideration in light of *Hensley v. Eckerhart,* 461 U.S. 424 (1983). *Rhodes v. Stewart,* 461 U.S. 952 (1983).[2] Almost three years later, the district court, on remand, again awarded the same amount of attorney fees, and this appeal followed.

II.

> The State has framed the issue on appeal as follows:

[2] *Hensley's* principal holding is that the "reasonableness" of attorneys fees awarded should be tied at least in part to "the degress of success obtained." 461 U.S. at 436. Its holding is not particularly helpful in deciding whether a plaintiff prevailed at all.

> The plaintiff-appellee's claim that he had been unconstitutionally denied "Hustler Magazine" was mooted by his release from prison and the death of his co-plaintiff. The district court's statement that the administrative regulation in question was constitutionally sound was not favorable to the plaintiff and was rendered two years after the claim became moot. The plaintiff-appellee obtained nothing as a consequence of his 41 (sic) U.S.C. §1983 suit and was not entitled to an award of attorneys' fees under 42 U.S.C. §1988 as the "prevailing party."

There are two major problems with the issue as framed. First, the State never appealed the merits of the district court decision and so any discussion of a "claim" being mooted is inappropriate. The State either knew or should have known about the status of Stewart and Reese before the district court ever entered a judgment, but there is no evidence that it ever made a mootness argument relative to the merits in the district court. This may be explained by the fact that the "relief" ordered by the district court was so innocuous that the State really was not concerned about mootness. Since the mootness was "party mootness" and not "issue mootness," the State may have concluded that it may as well face the issue now since another inmate could bring the same kind of suit.

The second problem with the issue as framed by the State is that its reference to the district court finding the State's administrative regulation "constitutionally sound" is disingenuous at best and intentionally misleading at worst. No one has ever contended that the basis for awarding attorney fees was that the court found an administrative regulation unconstitutional. What the court concluded was that the State failed to follow its own valid regulations.

The plaintiff is equally culpable in his approach to this case. Stewart's counsel[3] frames the issue as follows:

> The claim of plaintiff-appellee ("Mr. Stewart") did not become moot simply because the litigation was prolonged until he had been released from pri son. Nor did Mr. Stewart lose his identification as a prevailing party simply because he failed to obtain all of the relief which he requested or because he sought to take advantage of his legal victory in the manner defendants-appellants now suggest he should have. He is a "prevailing party," as the District court specifically found, and is entitled to an award of attorneys' fees under 42 U.S.C. §1988.

First, the implication that the State somehow "prolonged" this litigation until Stewart was released from prison is nonsense. Stewart was released eight weeks after the suit was filed.

Second, no one is arguing that Stewart is not a "prevailing party" because he failed to obtain all the relief requested. The State (now, at least) is arguing that at the time judgment was entered in this case, Stewart was no longer in a position to be a beneficiary of any of the relief granted.

There are other problems presented as well. The judgment reads as if this were a class action affording relief to all the prisoners in the State of Ohio. This clearly was not a class action. Plaintiff argues in his brief as if this were a class action. For example, at page six, he states:

> Since the appellants may not now ban "Hustler" unless they meet substantive constitutional standards in a procedurally satisfactory manner, the

[3] It is highly doubtful that Stewart has any interest in this case since the attorney fees, if collected, would go to the attorney and no money damages were sought.

> defendant's behavior toward the prisoners has been affected by Mr. Stewart's lawsuit . . . ."

(Emphasis added). What prisoners? Certainly not Mr. Reese who was dead and gone, and certainly not Mr. Stewart who was not only paroled more than three years before judgment was entered, but also had even concluded his parole a year and a half before judgment.

III.

Although this case should have been dismissed due to mootness before judgment was ever entered, no one every made this argument nor appealed the case on the merits. Therefore, mootness is only implicated now to the degree it interrelates with whether plaintiff was a prevailing party. Since both of the original plaintiffs were removed from prison one way or another long before a judgment was entered in this case, they could not have benefitted in any way from the judgment. Although they might receive some psychic satisfaction from having achieved a kind of Pyrrhic victory over the Establishment and might take comfort in the though that they have expanded the literary horizons for their former colleagues, they simply did not benefit from the judgment in any way that would make them a prevailing party under the rationale of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and its progeny. I would reverse the district court judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LARRY STEWART
Petitioner

vs. Civil Action C-2-78-36

JAMES RHODES, et al.
Respondents

OPINION AND ORDER
FILED JULY 25, 1986

This matter is before the Court on remand from the Sixth Circuit Court of Appeals for reconsideration of Judge Duncan's June 3, 1981 award of attorney's fees in a 28 U.S.C. §1983 action in light of the Supreme Court's opinion in the case of *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

The action underlying the dispute over attorney's fees in a 28 U.S.C. §1983 claim wherein the plaintiffs, now former inmates at the Chillicothe Correctional Institute in Chillicothe, Ohio, sought declaratory and injunctive relief for alleged violations of their First Amendment rights by defendants' refusal to allow them to freely subscribe to and read *Hustler* magazine.

On February 23, 1981, following the filing of stipulated facts and briefs by the parties, Judge Duncan issued an Opinion and Order holding:

> The three procedural requirements of notice, an opportunity to be heard, and an ultimate determination by a disinterested decision-maker are all elements provided by the defendants' existing administrative regulations. However, it is

undisputed that the defendants did not operate according to these regulations in determining whether to ban *Hustler* from the prison population in May 1976. Nor did the defendants follow their own regulations in determining that *Hustler* is "obscene."

It may be that a proper application of the *Miller v. California*, obscenity test would yield a conclusion that the subject publication is obscene. Moreover, there may well be other legitimate reasons, consistent with penological objective such as order and rehabilitation, why the prison authorities may properly bar the receipt of *Hustler* by inmates in the prison. These issues, how ever, are not properly before the Court at this time. It is clear that the defendants have not endeavored to apply either the procedural or substantive standards esta blished by the courts for determining what printed material can be made available to inmates.

The Court accordingly orders the defen dants, upon request by any one or more of the plaintiffs, to conduct a hearing permitting a reasonable number of representatives of the plaintiff class to appear and be heard concerning their wish to receive *Hustler*, to submit the question anew for a determination and to allow for a disinterested final decisionmaker to determine whether *Hustler* may lawfully be barred from the prison. The defendants may use the procedures outlined in 5190-9-19(F) and (6) in implementing this order.

Any decision to censor the publication at the institution must be made for reasons that are consistent with penological objec tives as stated in *Pell v. Procunier, supra; Guajardo v. Estelle, supra*, and this opinion.

On June 3, 1981, Judge Duncan issued an Opinion and Order awarding plaintiffs Five Thousand Three Hundred Six Dollars and Twenty-five Cents ($5,306.25) in attorney's fees pursuant to 42 U.S.C. §1988. Judge Duncan held that plaintiffs were "prevailing parties" within 42 U.S.C. §1988. The Court adopted the plaintiffs' characterization of the case as a lawsuit having as its gravamen "the unlawful and arbitrary exclusion of *Hustler* magazine which the plaintiffs wished to read" rather than focusing on the fact that plaintiffs did not get the injunctive relief requested.

On appeal, the Sixth Circuit held that plaintiffs were "prevailing plaintiffs" within 42 U.S.C. §1988 and affirmed the District Court judgment. Writ of Certiorari was subsequently granted to the United States Court of Appeals for the Sixth Circuit. The Supreme Court of the United States remanded the case to the Sixth Circuit Court of Appeals for further consideration in light of *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Thereafter, the Sixth Circuit Court of Appeals remanded the case to this Court.

Plaintiffs submit that the Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) does not affect Judge Duncan's conclusion in the June 3, 1981 Opinion and Order that plaintiff's are prevailing partis within 42 U.S.C. 1988. Defendants submit that plaintiffs are not prevailing parties within 42 U.S.C. §1988 because "plaintiff did not prevail in a practical manner." Defendants state that plaintiff only succeeded in obtaining a declaration that he had a right to appeal the decision to ban *Hustler* magazine under certain administrative regulations.

42 U.S.C. §1988 states in pertinent part:

> In any action or proceeding to enforce a provision of sections . . . 1983 . . . the court in its discretion, may allow the prevailing party, other than the United States, a rea sonable attorney's fees as part of the costs.

The threshold determination for an award of attorneys fees pursuant to 42 U.S.C. §1988 is whether or not the plaintiff is a "prevailing party." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). Plaintiffs may be considered a prevailing party if they "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. at 433 (1983); *Kreimes v. Department of the Treasury*, 764 F.2d 1186, 1188 (6th Cir. 1985).

After the Court makes the threshold determination that plaintiff is indeed a "prevailing party", it must then determine what fee is "reasonable." *Hensley v. Eckerhart*, 461 U.S. at 433 (1983). The most useful starting point is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. at 433 (1983). Evidence supporting these figures must be put forth by the plaintiff. *Hensley v. Eckerhart*, 461 U.S. at 433 (1983).

The District Court may then adjust this fee upward or downward upon other considerations, the most important being the results obtained. *Hensley v. Eckerhart*, 461 U.S. at 434 (1983). *But see, Pennsylvania v. Delaware Valley Citizens' Council*, ____ U.S. ____ (July 2, 1986) (slip op. at pp. 17-18). Where a plaintiff is deemed a prevailing party even though he has succeeded on only some of his claims for relief, the Court must ask the following two questions:

(1) Did plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded?

(2) Did plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making the award?

Hensley v. Eckerhart, 461 U.S. at 434 (1983). With respect to these questions, the Court stated that where claims are based on a common core of facts and it is difficult to divide the hours expended on a claim by claim basis, the District

Court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. *Hensley v. Eckerhart*, 461 U.S. at 435 (1983). A plaintiff who has won substantial relief should not have his fee reduced because the District Court did not adopt each contention raised. *Hensley v. Eckerhart*, 461 U.S. at 440 (1983). A plaintiff achieving only limited success, on the other hand, should be awarded only that amount of fees that is reasonable in relation to the results obtained. *Hensley v. Eckerhart*, 461 U.S. at 440 (1983).

Ideally, the litigants should settle the amount of the fee. Where settlement is not possible, the burden of establishing entitlement to an award is on the fee applicant. *Hensley v. Eckerhart*, 461 U.S. at 437 (1983).

In the case at bar, plaintiffs meet the threshold requirement of being a "prevailing party." As part of their requested relief, plaintiffs sought a judgment "Declaring the acts, policies and practices of the Defendant as complained of and described herein violate Plaintiffs' rights under the Constitution of the United States." The gravamen of plaintiffs' complaint, as characterized by Judge Duncan, was the "arbitrary and capricious exclusion of *Hustler* magazine which the plaintiffs wished to read." This encompasses two issues: (1) the exclusion of *Hustler* magazine and (2) the manner in which *Hustler* magazine was excluded. To the extent that the February 23, 1981 Opinion and Order of Judge Duncan's orders defendants to provide plaintiffs with the constitutional requirements of notice, an opportunity to be heard and a determination by a disinterested decisionmaker, it achieves some of the benefit the parties sought in bringing the suit. While plaintiffs did not receive injunctive relief, they did receive declaratory relief to the extent they complained of the manner in which the deprivation was achieved. Judge Duncan addressed the issue of actual deprivation of First Amendment rights to the extent it was feasible by specifying the constitutional framework within which the disinterested decisionmaker was to operate when making the decision to exclude or not exclude Hustler magazine.

Upon finding that plaintiffs are prevailing parties, this Court must now calculate a "reasonable fee." After reviewing affidavits submitted by plaintiff, describing in detail the hours spent on the case at bar, Judge Duncan arrived at a figure of $5,306.25. This is a reasonable cumulation of the hours expended multiplied by a reasonable hourly rate.

In the case at bar, the figure of $5,306.25 should not be adjusted either upward or downward. While plaintiff did not get all the relief which they requested, the relief requested was based on a common core of facts. Here it is not possible to divide the hours expended between the types of relief requested. *See, City of Riverside v. Rivera*, ____ U.S. ____ (June 27, 1986) (slip op. at pp.4-5). Plaintiff has achieved substantial relief because defendants were ordered by the Court to follow certain procedures prior to making the decision to ban *Hustler* magazine. In effect, the Court's February 23, 1981 order mandates the defendants to stop banning *Hustler* magazine unless it is found to be either obscene or consistent with penological objectives after notice to he (sic) plaintiffs, an opportunity to be heard and a decision by an unbiased decisionmaker. The relief granted by the Court directly corresponded to the gravamen of plaintiffs' complaint as seen by Judge Duncan: preventing the arbitrary and capricious deprivation of *Hustler* magazine.

Accordingly, in light of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), this Court finds that plaintiffs are "prevailing parties" within 42 U.S.C. §1988 and that Judge Duncan's prior award of $5,306.25 is "reasonable." The defendants are ORDERED to pay plaintiffs and their attorneys Five Thousand Three Hundred Six Dollars and Twenty-five Cents ($5,306.25) in attorney's fees and Nineteen Dollars and Sixty Cents ($19.60) in expenses pursuant to 42 U.S.C. §1988.

It is SO ORDERED.

/s/Joseph P. Kinneary
UNITED STATES DISTRICT JUDGE

SUPREME COURT OF THE UNTIED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

May 31, 1983

Mr. Allen P. Adler
State Office Tower Building
30 E. Broad St., 26th Floor
Columbus, OH 43215

Re: James A. Rhodes, et al.,
v. Larry Stewart
No. 82-1335

Dear Mr. Adler:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in Light of Hensley v. Eckerhart, 461 U.S. ____ (1983).

Very truly yours,

Alexander L. Stevas, Clerk

/s/Alexander L. Stevas

No. 81-3395
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LARRY STEWART, et al.,
Plaintiffs-Appellees

v.

JAMES RHODES, et al.,
Defendants-Appellants

ORDER

Filed November 9, 1982

BEFORE: MERRITT and KRUPANSKY, Circuit Judges*

Upon consideration, no judge having favored rehearing en banc, the Court concludes the issues joined in the petition for rehearing were fully considered in the original submission and decision in the present case. Accordingly, the petition for rehearing is DENIED.

ENTERED BY ORDER OF THE COURT

/s/John P. Hehman
Clerk

*The Honorable Frank W. Wilson, Chief Judge of the U.S. District Court for the Eastern District of Tennessee, sitting by designation, participated in the initial panel decision, however, Judge Wilson died on September 29, 1982, prior to consideration of the present order.

No. 81-3395

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LARRY STEWART, et al.,
Plaintiffs-Appellees

v.

JAMES RHODES, et al.,
Defendants-Appellants

ORDER
Filed May 25, 1982

BEFORE: MERRITT and KRUPANSKY, Circuit Judges; and WILSON, District Judge.*

This is an appeal from an award of attorney fees to the plaintiff-appellees, inmates of the Chillicothe Correctional Institute, by Judge Robert M. Duncan of the Southern District of Ohio in connection with appellees' civil action pursuant to 42 U.S.C. § 1983 challenging the defendant-appellants' refusal to permit plaintiffs to receive *Hustler* magazine.

The trial court found, on stipulated facts, that the defendants had not implemented their own applicable regulations in proscribing *Hustler* as obscene and therefore the defendants were ordered to conduct a hearing within sixty days in accordance with the Chillicothe Correctional Institute's regulation § 51-20-19 governing obscene material. No appeal was taken from this order. Accordingly, no issue with regard to the validity of the order is before this Court.

---

* The Honorable Frank W. Wilson, Chief Judge of the U.S. District Court for the Eastern District of Tennessee, sitting by designation.

Upon entry of this order, the plaintiffs sought attorney fees pursuant to 42 U.S.C. § 1988 and, over objections, were awarded an amount of $5,306.25 in fees. Principally, the defendants contended that the plaintiffs were not "prevailing parties" under the statute.

The defendants-appellants argue that since Judge Duncan merely ordered the defendants to consider the obscenity of *Hustler* pursuant to an existing regulation, the plaintiffs are in no better position than before the initiation of legal proceedings and thus the *status quo* is unchanged. Appellants emphasize that although the current regulation was not in effect when plaintiffs first requested *Hustler* in 1976, it was in effect prior to the institution of the lawsuit. Thus defendantappellants assert plaintiffs have not prevailed.

A party must prevail on "at least some of his claims" to be entitled to fees under the Act. *Hanrahan v. Hampton*, 446 U.S. 754 (1980) (Per curiam). Indeed, "[t]he question as to whether the plaintiffs have prevailed is a preliminary determination, necessary before the statute comes into play at all". *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

It is true, as appellants assert, that plaintiffs did not gain immediate access to *Hustler*. They did however achieve the right to a determination of the magazine's obscenity in accordance with the district court order. This Circuit has recognized that attorney fees are proper under § 1988 even if plaintiff has not succeeded on every issue of the case. As was stated in *Northcross, supra.*, "the notion of 'prevailing party' is to be interpreted in a practical, not formal matter." 611 F.2d at 636.

Applying the pronouncements of Northcross, plaintiffs below have prevailed in a practical manner in that they were afforded the right to a determination under regulations the defendant had previously ignored. Moreover, they became entitled to that determination within 60 days of a request

for such a deter.nination, which time period is not mandated by the regulations.

Accordingly, it is hereby ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

UNITED STATES DISTRICT COURT
FOR
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Larry Stewart, et al.,

v. Case Number C-2-78-36

James A. Rhodes, et al.,

JUDGMENT
Filed June 4, 1981

This action came on for consideration before the Court, The Honorable Robert M. Duncan United States District Judge, presiding. The issue having been duly considered and a decision having been duly rendered,
IT IS SO ORDERED THAT: defendants are ordered to pay plaintiffs and their attorneys Five Thousand Three Hundred Six Dollars and Twenty-Five Cents ($5,306.25) in attorney fees and Nineteen Dollars and Sixty Cents ($19.60) in expenses pursuant to 42 U.S.C. § 1988.

Dated at Columbus, Ohio this 4th day of June, 1981.

JOHN D. LYTER, CLERK

BY:/s/ Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Larry Stewart, et al.,
Plaintiffs,

v. Case No. C-2-78-36

James A. Rhodes, et al.,
Defendants.

MEMORANDUM AND ORDER
Filed June 3, 1981

This matter is before the Court on the motion of plaintiffs for an award of attorney fees pursuant to 42 U.S.C. § 1988 in the amount of $6,285.85. The motion is submitted with an affidavit of counsel and itemized statements of time spent in performing legal services in this case. Defendants oppose the motion on two grounds, claiming that the plaintiffs have not prevailed in the lawsuit so as to be entitled to any attorney fees at all, and that even if entitled to attorney fees, they are not entitled to reimbursement for time spent by law clerks of the firm.

The Court holds that the plaintiffs are "prevailing parties" within the meaning of 42 U.S.C. § 1988. In its decision in *Northcross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979), the Court of Appeals for the Sixth Circuit instructed that the question whether a party has prevailed is the threshold question to be answered before § 1988 comes into play. The circuit court stated:

> The question as to whether plaintiffs have pre vailed is a preliminary determination, necessary before the statute comes into play at all. Once that issue is determined in the plaintiffs' favor, they are entitled to recover attorneys' fees for "all time reasonably spent on a matter." The fact that some of that time was spent in pursuing issues on research which

> was ultimately unpro ductive, rejected by the court, or mooted by intervening events is wholly irrelevant . . . the district courts are to allow compensation for hours expended on unsuccessful research or liti gation, unless the positions asserted are frivolous or in bad faith. There are numerous practical reasons why a court may not be permitted to dissect a lawsuit into "issues and parts of issues as to wh.ch the plaintiffs did not prevail,". . . . Congress had mandated that the prevailing party's attorney should be compensated "as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter." We know of no "tradi tional" method of billing whereby an attorney offers a discount based upon his or her failure to prevail on "issues or parts of issues."

Id. at 636. The Court believes this language forcefully answers the defendants' contention that the plaintiffs have not prevailed in this lawsuit. The plaintiffs are inmates or former inmates at the Chillicothe Correctional Institution in the custody of the Department of Rehabilitation and Corrections of the State of Ohio, a depart nent headed by the defendant Denton. They brought this lawsuit after having been deprived of the opportunity to read *Hustler* magazine in the prison. Although the defendants contend that plaintiffs failed to prevail because they failed to obtain the injunctive relief requested in their complaint, the Court finds that plaintiffs' characterization of this lawsuit as having as its gravamen "the unlawful and arbit ary exclusion of Hustler Magazine which the Plaintiffs wished to read," is a more accurate description of the case as a whole.

In its opinion, the Court ackowledged that prisoners surrender certain of thei: First Amendment rights to the legitimate penological objectives of the corrections system, and that certain censorship of prisoner mail may be justifiable. However, the Court held that the defendants had not endeavored to apply either the procedural or substantive standards established by the courts for determining what printed material can be made available to inmates. Nor had

the defendants attempted to follow their own administrative regulations providing a procedure for protecting the rights of the inmates in this regard. Accordingly, the Court ordered the defendants to provide the plaintiffs with notice, an opportunity to be heard, and an ultimate determination by a disinterested decision-maker on the question. Under the circumstances, the plaintiffs have clearly prevailed in this lawsuit.

Defendants' second contention is that the 11.5 hours of law clerk's time, for which plaintiffs seek compensation at the rate of $25.00 per hour, cannot be reimbursed as a part of attorney's fees award. The Court disagrees. As defendants acknowledge, the Sixth Circuit Court of Appeals stated in *Northcross:*

> The authority granted in Section 1988 to award a "reasonable attorney's fee" included the authority to award those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client in the course of providing legal services. Reasonable Photocopying and paralegal expenses and travel and telephone costs are thus recoverable pursuant to the statutory authority of Section 1988.

Id. at 639. The affidavit of counsel for plaintiffs identifies the label "Clerks" on the attached fee bills as referring to law students who have completed two or three years of law school, employed by the law firm to assist in legal research and preparation of briefs, and who are uniformly within the top ten per cent of their graduating class in their respective law schools. This Court has regularly included in attorney fee awards payments, at reduced rates, for like services by law clerks. The practice often reduces the time billed at higher rates by attorneys themselves. However, the Court finds it difficult to justify certain of those expenses. Counsel's schedule lists 2.25 hours of clerk time consisting solely of trips to the courthouse to file papera and 3 hours of clerk time for a trip to the public library to locate a newspaper article regarding a related case. These hours should be

excluded from the fee award. This accounts for $131.25 of the requested fee award and reduces it to $6,135.00.

The defendants have not objected to either the time billed or the hourly rates asked by the two lawyers for plaintiffs. The Court finds them, for the most part, to be reasonable. However, counsel's schedule lists 12.75 hours for work done during September 1978 on "proposed findings of fact and conclusions of law" which never found their way into the record. This case was submitted on a stipulation of facts and briefs, the preparation of which constitutes a substantial portion of Counsel's fee request. The Court believes it would be unreasonable to require the State to pay for work done on "findings and conclusions." This accounts for $828.75 of the requested fee award and reduces it to $5,306.25.

Accordingly, defendants are ordered to pay plaintiffs and their attorneys Five Thousand Three Hundred Six Dollars and Twenty-Five Cents ($5,306.25) in attorney fees and Nineteen Dollars and Sixty Cents ($19.60) in expenses pursuant to 42 U.S.C. § 1988.

It is so ORDERED.

/s/ Robert M. Duncan, Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Larry Stewart, et al.,

v. Case Number C-2-78-36

James A. Rhodes, et al.,

AMENDED JUDGMENT

Filed May 19, 1981

This action came on for consideration before the Court, The Honorable Robert M. Duncan United States District Judge, presiding. The issues having been duly considered and a decision having been duly rendered,
IT IS ORDERED AND ADJUDGED THAT: The Court orders the defendants, upon request by the plaintiffs or any prisoner of the State of Ohio, to conduct a hearing at which the prisoner or his representative will appear and be heard concerning his wish to receive *Hustler,* the person requesting the hearing will be joined as a party plaintiff in this case, to submit the question anew for a determination and to allow for a disinterested final decisionmaker to determine whether *Hustler* may lawfully be barred from the prison. The defendants may use the procedures outlined in 5190-9-19(F) and (G) in implementing this order.

Any decision to censor the publication at the institution must be made for reasons that are consistent with penological objectives as stated in *Pell v. Procunier, supra; Guajardo v. Estelle, supra,* and this opinion.

The defendants are ordered to hold a hearing and render a decision within thirty (30) days of the date of the request.

Dated at Columbus, Ohio this 19th day of May, 1981

JOHN D. LYTER, CLERK

By:/s/ Deputy Clerk

UNITED STATES DISTRICT COURT
FOR
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Larry Stewart, et al.,
Plaintiffs,

v. Case Number C-2-78-36

James A. Rhodes, et al.,
Defendants

AMENDMENT TO ORDER
Filed May 18, 1981

It has come to the attention of the Court that in its order of April 1, 1981, and in its judgment of April 2, 1981, the administrative regulations were improperly cited. Accordingly, the last three paragraphs of that order are ordered amended to read as follows:

The Court orders the defendants, upon request by the plaintiff or any prisoner of the State of Ohio, to conduct a hearing at which the prisoner or his representative will appear and be heard concerning his wish to receive *Hustler,* the person requesting the hearing will be joined as a party plaintiff in this case, to submit the question anew for a determination and to allow for a disinterested final decisionmaker to determine whether *Hustler* may lawfully be barred from the prison. The defendants may use the procedures outlined in 5190-9-19(F) and (G) in implementing this order.

Any decision to censor the publication at the institution must be made for reasons that are consisent with penological objectives as stated in *Pell v. Procunier, supra; Guajardo v. Estelle, supra,* and this opinion.

The defendants are ordered to hold a hearing and render a decision within thirty (30) days of the date of the request.

The Clerk shall enter amended judgment accordingly.

/s/Robert M. Duncan, Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Larry Stewart, et al.,

v. Case Number C-2-78-36

James A. Rhodes, et al.,

JUDGMENT
Filed April 2, 1981

This action came on for consideration before the Court, The Honorable Robert M. Duncan United States District Judge, presiding. The issues having been duly considered and a decision having been duly rendered,
IT IS ORDERED AND ADJUDGED THAT: the defendants, upon request by the plaintiffs or any prisoner of the State of Ohio, to conduct a hearing at which the prisoner or his representative will appear and be heard concerning his wish to receive *Hustler,* the person requesting the hearing will be joined as a party plaintiff in this case, to submit the question anew for a determination and to allow for a disinterested final decisionmaker to determine whether *Hustler* may lawfully be barred from the prison. The defendants may use the procedures outlined in 5190-9-10(F) and (6) in implementing this judgment.

Any decision to censor the publication at the institution must be made for reasons that are consistent with penological objectives as stated in *Pell v. Procunier, supra; Guajardo v. Estelle, supra,* and the opinion and order in this action.

The defendants are ordered to hold a hearing and render a decision within thirty (3) days of the date of the request.

Dated at Columbus, Ohio this 2 day of April, 1981.

JOHN D. LYTER, CLERK

By:/s/ Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Larry Stewart, et al.,
Plaintiffs

v. Case No. C-2-78-36

James A. Rhodes, et al.,
Defendants

ORDER
Filed April 1, 1981

The motion of the parties to amend the Court's order of February 23, 1981, is GRANTED. The last three paragraphs of that order are ORDERED amended to read:

The Court orders the defendants, upon request by the plaintiffs or any prisoner of the State of Ohio to conduct a hearing at which the prisoner or his representative will appear and be heard concerning his wish to receive *Hustler*, the person requesting the hearing will be joined as a party plaintiff in this case, to submit the question anew for a determination and to allow for a disinterested final decision-maker to determine whether *Hustler* may lawfully be barred from the prison. The defendants may use the procedures outlined in 5190-9-10(F) and (6) in implementing this order.

Any decision to censor the publication at the institution must be made for reasons that are consistent with penological objectives as stated in *Pell v. Procunier, supra; Guajardo v. Estelle, supra*, and this opinion.

The defendants are ordered to hold a hearing and render a decision within thirty (30) days of the date of the request.

The Clerk shall enter judgment accordingly.

/s/Robert M. Duncan, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Larry Stewart, et al.,
Plaintiffs

v. Case No. C-2-78-36

James A. Rhodes, et al.,
Defendants

OPINION AND ORDER
Filed February 23, 1981

This matter is before the Court for adjudication on the complaint, answer thereto, stipulations of fact, depositions, exhibits and briefs. The action is brought under 42 U.S.C. §1983 for redress of the alleged deprivation, under color of state law, of plaintiffs' constitutional rights. The plaintiffs seek declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-02.

The plaintiffs are inmates at the Chillicothe Correctional Institute in Chillicothe, Ohio, in the custody of the Department of Rehabilitation and Corrections of the State of Ohio. The defendants, operating under color of state law as defined in 42 U.S.C. §1983, have authority over and control of the plaintiffs.

Jurisdiction and venue are not disputed.

FACTS

Plaintiffs allege violations of their First Amendment rights by the defendants' refusal to allow plaintiffs freely to subscribe to and read *Hustler* magazine within the prison. The refusal is based on several decisions of the Department's Publications Screening Committee and subsequent affirmations of such decisions by Director Denton. During the relevant time period, the Committee operated under two

different administrative regulations that defined procedures and standards to be used by the Committee in determining whether a particular publication should be excluded from the prisons.

The following statement of facts has been stipulated by the parties:

1. Defendant George F. Denton, as director of the Ohio Department of Rehabilitation and Corrections, is vested with authority to administer the institution in which plaintiffs are incarcerated. Under his direction the Department has established a policy under which certain publications are not permitted in the institutions under the control of the Department.

2. During 1976 the policy of the Department regarding publications was as embodied in Administrative Regulation 814 (b) (hereinafter referred to as "814(b)"). The regulation generally provided that publications could be excluded if they were "obscene" or "inflammatory." A publication was "obscene" if:

> the dominant theme of the publication when considered in its entirety, is patently offensive to prevailing community standards relating to the description or representation of sexual matters, and the publication is utterly void of redeeming social value. 814(b)(3)(A).

As a matter of law, the subject defintion failed to meet the test of the Supreme Court as to obscenity as set forth in the case of *Miller v. California*, 413 U.S. 15 (1973).

3. Policy 814 (b) (4) was administered by an advisory Publication Screening Committee composed of four members during the year of 1976. Effective January 1, 1977, the Committee was expanded to five members. The committee members meet irregularly, and often review publications outside of meetings, and then express an opinion in the form of a note as to whether a given publication

ought to be permitted or barred. The recommendation of the committee is subject to review by Director Denton and has always been adopted.

4. On or about December 31, 1976, Regulation 5120-9-19 of the Department of Rehabilitation and Correction was adopted and became effective January 1, 1977. This regulation was adopted in compliance with an order of the United States District Court for the Northern District of Ohio. *See Taylor v. Perrini*, 413 F. Supp. 189, 214 (1976). It remains effective as of the date relevant to plaintiffs' complaint. It generally provides for the exclusion of material which is "obscene under United States Supreme Court standards." The regulation provides detailed criteria for determining obscenity including a three-part test, found in subparagraphs (D)(1), which test requires a finding by the reviewing authorities that the printed material meets all three subparagraphs. In addition, publications may be prohibited if they are found to be inflammatory pursuant to paragraph (D)(2). Under this regulation, the initial review of printed material is to be done by the mailroom personnel.

5. Since May of 1976, plaintiffs have sought to acquire *Hustler* magazine but were denied permission as a matter of Department of Rehabilitation and Correction policy. It is, however, the policy of the Department to permit inmates to receive *Playboy, Penthouse, Oui* and *Gallery* magazines, along with other publications devoted to adult entertainment.

6. Prior to May of 1976, inmates were permitted to receive *Hustler*. On May 27, 1976, the Publications Screening Committee voted to remove *Hustler* from the list of permitted publications and to review the magazine on a monthly basis. Since May of 1976, inmates of all penal institutions within the State of Ohio have not been permitted to receive *Hustler*.

7. If called to testify, Stephen Yost would state that he is an attorney who at all times relevant was the Administrative Assistant to the Director of the Ohio Department of Rehabilitation and Correction. He was a member of the Publication Screening Committee in May of 1976. He was

aware that 814(b) did not conform to the definition of obscenity which prevailed under Supreme Court rulings as of May 1976, but he did not advise the members of the committee of this (deposition p. 12). His recollection is that the committee generally felt *Hustler* was obscene since it appealed only to prurient interests and had no redeeming social value. There were no discussions of contemporary community standards during the May 1976 deliberations over *Hustler*. Yost was aware that *Hustler* was available generally throughout Ohio but neither that fact nor the fact that monthly circulation exceeded two million influenced the determination of contemporary community standards.

8. If called to testify, Frederick R. Silber would state that he is a clergyman now serving as Administrator of Religious Services for the Department of Rehabilitation and Correction. Since about September of 1975, he has served as convener of the Publication Screening Committee. He participated in committee discussions in May of 1976 regarding *Hustler* but had no vote. He was aware that *Hustler* was on sale throughout Ohio and testified that the committee members were also aware of that fact (deposition p. 13).

9. If called to testify, John Becker would state that he is a librarian at Otterbein College and was a member of the Publication Screening Committee. He voted to exclude Hustler because he felt "that as a unit it was just void of any literary or artistic value," and "in poor taste." (Deposition p. 9). He had never seen it for sale in his home community of Westerville, Ohio. He stated that "that's my community" (deposition p. 9 and 13). He therefore felt that it had no place in the community (deposition p. 12). He defined "prurient" as "sexually arousing" (deposition p. 15) in applying 814(b) to *Hustler*. He regarded his function on the committee as to express his opinion as to what was "good or bad." (Deposition p. 13). He did not regularly read sexually oriented literature that is generally restricted to the adult population (deposition p. 14). The circulation of *Hustler* was irrelevant to the determination of community standards in his view.

10. If called to testify, John B. McTaggart would state that he is Director of Library Sciences at the Methodist Theological School in Delaware, Ohio. He was appointed to the Publications Screening Committee on November 17, 1977. He participated in a review of the April 1978 issue of *Hustler*. According to his interpretation of 5120-9-19, a publication was obscene if it contained a graphic representation of the clitoris (deposition p. 7). He did not consider any other aspects of the publication nor did he read the magazine. (Deposition p. 7). He was aware that *Hustler* is widely distributed throughout the major urban areas of Ohio but did not take that fact into consideration in making his decision. (Deposition p. 10).

11. If called to testify, S.M. Patterson would state that he is the Assistant Chief of the Division of Institutions, Ohio Department of Rehabilitation and Correction. In voting to bar *Hustler*, he determined from an examination of the magazine as a whole that it was "utterly devoid of any redeeming social value" and that it was "simply obcene," in his "personal opinion," merely a "matter of pornography." (Deposition p. 9). In his view, depiction of female genitalia was obscene as a matter of law, as is the posing of the body for sexual appetite. (Deposition p. 10). Since he viewed the prison community as distinct from the population generally the issue of contemporary community standards was not considered. (Deposition p. 11 and 12).

12. If called to testify, Carolyn A. Watts would state that she is now an Assistant United States Attorney in Cleveland. She served on the Publication Screening Committee in 1976. She voted to bar the June 1976 issue because the issue contained something that particularly "offended" her conscience. (Deposition p. 9). Because she was unaware of any community standard, she did not apply any such standard when reviewing *Hustler*.

13. If called to testify, Maury C. Koblentz would state that he is the retired Chief of the Division of Special Services and the former Commissioner of Corrections for the Department. He was a member of the Publications Screening

Committee from May or June of 1975 until November 1976. In applying 814(b), Koblentz did not consider the concept of prurience since it was not contained in the regulation. (Deposition p. 10). To determine community standards, he applied his own concept of offensiveness and his personal taste. (Deposition p. 11). The generally availability of *Hustler* throughout the marketplace was irrelevant to his deliberations since he regarded standard for obscenity generally as different from standard of obscenity for the prison population (deposition p. 13).

14. Dr. Robert M. Collie is now a member of the Publication Screening Committee and did not act in that capacity during the May 1976 through August 1978 Committee proceedings. Defendants wish to call Dr. Collie as an expert witness. Plaintiffs object to Dr. Collie's qualifications and believe the entire deposition is incompetent evidence for these proceedings.

15. Administrative Ruling 5120-9-19 makes provision for an appeal to the Publication Screening Committee by the inmate where the prison authorities have determined that a given publication is obscene. No appeal from the Publication Screening Committee exists in the case of a publication placed on the "not permitted" list. No hearings of any type were conducted by the Publication Screening Committee or the Department prior to placing *Hustler* on the "not permitted" list. However, there was a review of the publication by each member of the committee prior to the publication being removed from the permitted list. George F. Denton acted affirmatively on all recommendations relevant to this case but exercised no independent judgment.

16. All issues of *Hustler* since its inception have been sold freely in all jurisdictions of Ohio to the adult public. The only exception to this is Hamilton County wherein the sale has been restricted.

No copy of *Hustler* magazine has ever been adjudicated obscene by any court in the United States with the exception of the July 1975 issue which was adjudicated obscene by

Hamilton County Common Pleas Court which case in on appeal in the First Circuit Court of Appeals. No other court anywhere in the United States has ruled any issue obscene.

17. All decisions of the Publications Screening Committee barring *Hustler* magazine from the penitentiary system from May of 1976 through August of 1978, inclusive, were based upon the belief of the Committee that the publications in question were obscene and therefore prohibited pursuant to Section (F)(1) of the regulation. No issue of *Hustler* was ever barred during this period of time because it was inflammatory pursuant to Section (F)(2). For purposes of this litigation, the final issue being being raised in question is the August 1978 issue so that final dispositions may be had and the matters resolved.

The Scope Of Plaintiffs' First Amendment Rights

Plaintiffs claim the prison's refusal to permit the plaintiffs to receive *Hustler* magazine deprives them of the exercise of their First Amendment rights. In order to determine whether plaintiffs' claim is meritorious, the Court need first decide the extent of the First Amendment rights of the plaintiffs.

Prisoners do not retain all First Amendment rights, but surrender certain of them to the legitimate penological objectives of the corrections system.

> . . . lawful incarceration brings about the necessary withdrawal of many privileges and rights, a retraction justified by the considerations underlying our penal system . . . In the First Amendment context a corollary of this principle is that a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment rights must be analyzed in terms of the legitimate policies and goals of the

> corrections system, to whose custody and care the prisoner had been committed in accordance with due process of law.

Pell v. Procunier, 417 U.S. 817 (1974).

Thus, censorship of prisoner mail is justified if it furthers an important or substantial governmental interest, which is unrelated to the supression of expression, such as security, order and rehabilitation and if it is no greater than necessary to protect that interest. *Procunier v. Martinez*, 416 U.S. 396 (1974).

Grounds for withholding printed material need not be so narrow as those applicable to society at large, such as materials judicially declared obscene, *Guajardo v. Estelle*, 580 F. 2d 748 (5th Cir. 1978); nor, for that matter, may they be so broad as to reflect an individual official's personal opinion of what is offensive or inflammatory, *Hardwick v. Ault*, 447 F. Supp. 106, 131 (M.D. Ga. 1978).

The applicable law is clearly stated by the Fifth Circuit in *Guajardo v. Estelle*, 580 F.2d 748 (5th Cir. 1978):

> The district court ruled that prison authorities could not ban sexually explicit magazines unless they had been judicially declared obscene. Adoption of that rule would merely state a truism since the Supreme Court has categorically settled that obscenity is outside of the first amendment's protections. *Miller v. California*, 413 U.S. 15 (1973); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Roth v. United States*, 354 U.S. 476 (1957). Other circuits have noted that prison officials may deny prisoners access to materials that are not obscene. *Aikens v. Jenkins*, 534 F.2d 751 (7th Cir. 1976). We think that such a rule is mandated by the prison environment. The first amendment rights of the prisoners cannot be evaluated without reference to that environment and to the type of audience it involves. *See Ginsberg v. New York*, 390 U.S.

> 629 (1968); *Miller v. California, supra.* Prison officials testified that non-consenual homosexuality was a significant problem in Texas prisons. The State of Texas has seen fit to prohibit homosexual acts even between consenting adults. Moreover, the state does not and is not constitutionally required to permit prisoners conjugal visits. Thus, for inmates stimulated by sexually explicit material the temptation to further criminal behavior looms large. We think it clear that a legitimate rehabilitation interest of prison authorities is involved in preventing homosexual acts. We are willing to condone the introduction of material into the prison that would exacerbate the situation. On the other hand, we have just held that censorship may not proceed according to the whims of administrators. For that reason we set out the following guidelines.
>
> Before delivery of a publication may be refused, prison administrators must review that particular issue of the publication in question and make a specific factual determination that the publication is detrimental to prisoner rehabilitation because it would encourage deviate criminal sexual behavior. *See Thibodeaux v. State of South Dakota*, 553 F.2d 558 (8th Cir. 1977); *Carpenter v. South Dakota*, 536 F.2d 759 (8th Cir. 1976), *cert. denied*, 431 U.S. 931 (1977); *Morgan v. LaValle*, 526 F.2d 221 (2d Cir. 1975). Prisoners must, of course, be allowed to appeal that decision through proper administrative channels.

Accord, *Hopkins v. Collins*, 548 F.2d 503 (4th Cir. 1977).

The three procedural requirements of notice, an opportunity to be heard, and an ultimate determination by a disinterested decision-maker are all elements provided by the defendants' existing administrative regulations. However, it is undisputed that the defendants did not operate according to these regulations in determining whether to ban Hustler from the prison population in May 1976. Nor did the

defendants follow their own regulations in determining that *Hustler* is "obscene."

It may be that a proper application of the *Miller v. California* obscenity test would yield a conclusion that the subject publication is obscene. Moreover, there may well be other legitimate reasons, consistent with penological objectives such as order and rehabilitation, why the prison authorities may properly bar the receipt of *Hustler* by inmates in the prison. These issues, however, are not properly before the Court at this time. It is clear that the defendants have not endeavored to apply either the procedural or substantive standards established by the courts for determining what printed material can be made available to inmates.

The Court accordingly orders the defendants, upon request by any one or more of the plaintiffs, to conduct a hearing permitting a reasonable number of representatives of the plaintiff class to appear and be heard concerning their wish to receive *Hustler*, to submit the question anew for a determination and to allow for a disinterested final decision-maker to determine whether *Hustler* may lawfully be barred from the prison. The defendants may use the procedures outlined in 5190-9-19(F) and (6) in implementing this order.

Any decision to censor the publication at the institution must be made for reasons that are consistent with penological objectives as stated in *Pell v. Procunier, supra; Guajardo v. Estelle, supra*, and this opinion.

The defendants are ordered to hold a hearing and render a decision within sixty (60) days of this order.

/s/Robert M. Duncan, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LARRY STEWART, et al.,
Plaintiffs,

v. Case No. C-2-78-36

JAMES A. RHODES, et al.,
Defendants.

ANSWER
Filed March 15, 1978

Jurisdiction

1) The defendants acknowledge the jurisdiction of this Court in actions brought pursuant to 42 U.S.C. § 1983 and under 28 U.S.C. § 1343, and pursuant to 28 U.S.C. §§ 2201 and 2202.

Parties

2) Defendants admit that plaintiffs Stewart and Reese are prisoners of the State of Ohio.

3) Defendants admit that James A. Rhodes is the Governor of the State of Ohio; George F. Denton is the Director of the Ohio Department of Rehabilitation and Correction; and Ted Engle is the Superintendent of the Chillicothe Correctional Institute.

Facts

4) Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations made in paragraph 4 of the complaint.

5) Defendants admit that Playboy and Penthouse are usually allowed to be received by prisoners of the State of Ohio. The defendants are without knowledge of information sufficient to form a belief as to the truth of the remaining allegations made in paragraph 5 of the complaint.

6) Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations made in paragraph 6 of the complaint.

7) Defendants deny the allegations made in paragraph 7 of the complaint.

8) Defendants deny the first sentence of paragraph 8 as written. Defendants deny the remaining allegations made in paragraph 8.

9) Defendants deny the allegations made in paragraph 9 of the complaint.

10) Defendants deny each and every allegation not specifically admitted to be true.

First Defense

11) Plaintiffs have failed to state a claim on which relief can be granted.

Second Defense

12) Defendants' actions were based on a good faith reliance upon existing administrative regulation practices and policies of the Ohio Department of Rehabilitation and Correction, having prior approval by the federal judiciary.

Third Defense

13) Plaintiffs have failed to join parties under F.R. Civ. P. 19.

Respectfully submitted,
WILLIAM J. BROWN
Attorney General

/s/ALLEN P. ADLER, Trial Attorney
Assistant Attorney General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing Answer has been forwarded to the Attorney for the Plaintiffs, Laurence E. Sturtz, Brownfield, Kosydar, Bowen, Bally & Sturts, 140 East Town Street, Columbus, Ohio 43215, via regular U.S. Mail, postage prepaid, this 13th day of March, 1978.

/s/Allen P. Adler
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Larry Stewart, 142-201 :
P. O. Box 5500
Chillicothe, Ohio 45601 :

and :

Albert Reese, 143-437 :
P. O. Box 5500
Chillicothe, Ohio 45601, :

Plaintiffs, :

v. : Case No. 2-78-36

James A. Rhodes, Governor :
State of Ohio
State House :
Columbus, Ohio 43215

:

and
George F. Denton, Director :
Department of Rehabilitation
and Correction :
1050 Freeway Drive North
Columbus, Ohio :

and :

Ted Engle, Superintendent
Chillicothe Correctional :
Institute
P. O. Box 5500 :
Chillicothe, Ohio 45601
Defendants. :

Filed January 17, 1978

DECLARATORY JUDGMENT, PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

I. PARTIES

1. Plaintiffs are, at all times herein relevant, prisoners of the State of Ohio in the custody of the Department of Rehabilitation and Corrections. They are currently confined at the Chillicothe Correctional Institute in Chillicothe, Ohio 45601.

2. Defendant James A. Rhodes is the duly elected and acting Governor of the State of Ohio, Defendant George F. Denton, is the duly appointed Director of the Department of Rehabilitation and Corrections. Defendant Ted Engle is the Superintendent of the Chillicothe Correctional Institute. The Defendant in the order listed above are legally responsible for the overall operation of the State's Rehabilitation and Correctional institutes, and more specifically, are directly and indirectly responsible for the overall operation and administration of the institution in which Plaintiff's are now institutionalized.

II. JURISDICTION

3. This is a civil action authorized by 42 USC 1983 to redress the deprivation, under color of state law, of rights, privileges and immunities secured under the Constitution of the United States. This Court has jurisdiction under 28 USC 1343. Plaintiffs seek declaratory and injunctive relief pursuant to 28 USC 2201 and 28 USC 2202.

III. FACTS

4. On or about the 15th day of June, 1977, Plaintiffs made known to institution officials assigned to the mail room of their desire to subscribe to Hustler Magazine. Plaintiffs have been informed that subscriptions to Hustler were not permitted for inmates and that any issues of Hustler received in the institution mail room would be returned to the publisher or destroyed. Plaintiffs were informed that they would not

be permitted to receive Hustler as a matter of Department of Rehabilitation and Correction policy. The policy being followed and executed by Defendant Engle is a policy that was fostered and perpetuated by Defendants Rhodes and Denton.

5. Hustler Magazine is what could be considered to be an adult oriented magazine and in accordance with many rulings of courts around the country, is on a par and similar in content to Playboy and Penthouse Magazines, among others. Both Playboy and Penthouse are publications which have been approved for inmate subscription and are permitted to be received through the institution mail room. Hustler was at one time also an approved publication, however, in 1975, that ruling was altered giving rise to the present practice of not permitted the magazine.

6. No hearings of any type have ever been conducted in this respect and the only reason given by prison officials other than "departmental policy" is allegations that the magazine is obscene. Hustler Magazine is presumably protected First Amendment expression and with the exception of a single case in Cincinnati, Ohio, has never been declared obscene anywhere in the United States. Furthermore, Hustler Magazine is published and sold via subscriptions through the United States mails, being properly transmitted through the mails with no allegations ever having been raised by any governmental officials that the publication was in violation of the United States mail rules.

7. The actions of the Defendants in banning Hustler Magazine inside the walls of this institution and other institutions around the State of Ohio is arbitrary, capricious, without any legal foundation and based upon no valid evidence. The Defendants in banning the publication are neither judge nor jury nor a tribunal properly charged with declaring the alleged obscenity or non obscenity of the publication.

8. Plaintiffs are adult persons who are possessed of basic constitutional rights including the First Amendment. Plaintiffs

have a free choice whether to read or not read various publications including Hustler. No injury will be suffered by Plaintiffs by the reading of said publication. The classification of Hustler Magazine, as opposed to other magazines of like and similar type, to-wit: Playboy or Penthouse is absolutely arbitrary and capricious.

9. The actions of the Defendants are a conserted and systematic attempt to deprive Plaintiffs of rights, privileges and immunities secured to them by the Constitution of the United States. Their actions are discriminatory and in violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. Their actions are in deprivation of basic constitutional rights of the Plaintiffs, without proper due process requirements as guaranteed by the Fourteenth Amendment of the Constitution of the United States. Additionally, the materials being sought are protected First Amendment expression and the censorship prohibiting the same from being delivered to Plaintiffs, at their request, violate the First Amendment of the Constitution of the United States.

10. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs described. Plaintiffs have and will continue to be injured irreparably by the actions of the Defendants unless this Court grants the declaratory injunctive relief sought by Plaintiffs.

WHEREFORE, Plaintiffs pray this Court make and enter a judgment as follows:

1. Declaring the acts, policies and practices of the Defendants as complained of and described herein violate Plaintiffs' rights under the Constitution of the United States.

2. A preliminary and permanent injunction which:

   a. Prohibits the Defendants, their successors in office, agents, employees and all other persons in active concert with them from denying Plaintiffs their right to receive Hustler Magazine, in the future.

b. Prohibits the Defendants, their successors in office, agents, employees and all other persons in active concert with them from transferring Plaintiffs to any other institution without the consent of Plaintiffs and from retaliating against Plaintiffs in any manner or form whatsoever.

3. For any other relief in law or in equity as the Court deems appropriate and just. Respectfully submitted,

/s/Laurence E. Sturtz (STU02)
BROWNFIELD, KOSYDAR, BOWEN
BALLY & STURTZ
140 East Town Street
Columbus, Ohio 43215
(614) 221-5834
Attorneys for Plaintiffs

Of Counsel:

Howard Spies
40 West Gay Street
Columbus, Ohio 43215
(614)464-2070

INSTRUCTIONS FOR SERVICE

Please serve the Defendants with a copy of the foregoing Declaratory Judgment, Preliminary and Permanent Injunctive Relief at the following locations by certified mail:

1. James A. Rhodes, Governor
   State of Ohio
   State House
   Columbus, Ohio 43215

2. George F. Denton, Director
   Department of Rehabilitation
   and Correction
   1050 Freeway Drive North
   Columbus, Ohio

3. Ted Engle, Superintendent
   Chillicothe Correctional Institute
   P. O. Box 5500
   Chillicothe, Ohio 45601

/s/Laurence E. Sturtz (STU02)
Attorneys for Plaintiffs

Supreme Court, U.S.
FILED
AUG 22 1988
JOSEPH F. SPANIOL
CLERK

(2)

No. 88-139

In The

Supreme Court of the United States

October Term, 1987

JAMES A. RHODES, et al.,

Petitioners,

v.

LARRY STEWART,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LYMAN BROWNFIELD
Counsel of Record

JEFFREY D. SWICK
DONALD A. NICKERSON, JR.
On The Brief

LYMAN BROWNFIELD LAW OFFICES
250 East Broad Street
12th Floor
Columbus, Ohio 43215
(614) 221-5834

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Is the respondent a prevailing party pursuant to 42 U.S.C. §1988, so as to entitle him to attorney's fees under that statute?

TABLE OF CONTENTS

	Pages
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED	1
I OPINIONS BELOW	1
II JURISDICTION	1
STATUTES WHICH THE CASE INVOLVES	1
STATEMENT OF THE CASE	2
ARGUMENT IN SUPPORT OF DENYING CERTIORARI	4
A. NO CONFLICT WITH DECISIONS OF THIS COURT	4
B. NO CONFLICTS WITH OTHER CIRCUITS	6
C. IMPORTANCE OF THE ISSUE	7
D. CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES

Hensley v. Eckerhart, 461 U.S. 424, 76 L.Ed.2d 40, 103 S.Ct. 1933 (1983) 4, 5, 6

Hewitt v. Helms, 482 U.S. ___, 96 L.Ed.2d 654, 107 S.Ct. 2672 (1987) 4, 5, 6

National Coalition Against the Abuse of Pesticides v. Thomas, 828 F.2d 42 (D.C. Cir. 1987) 6

Seals v. Quarterly County Court of Madison County, 562 F.2d 390 (6th Cir. 1977) 6

STATUTES

28 U.S.C. §1254(1) 1

42 U.S.C. §1988 ..... 1, 5, 6

Ohio Corrections Department, A.R. 5120-9-19 ..... 3, 5

Ohio Corrections Department, A.R. 814 3

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

I. OPINIONS BELOW

The case at bar was appealed on two separate occasions to the Sixth Circuit Court of Appeals. The first opinion was filed on November 9, 1982, (P.App.A-22)[1]. The second opinion was filed on April 27, 1988, (P.App.A-4). Both opinions are unreported. The decisions of the United States District Court for the Southern District of Ohio, Eastern Division are unreported, (P.App.15, 38). A petition for writ of certiorari was previously granted by this Court on May 31, 1983, (P.App.21). The decision of the Supreme Court of the United States was reported at 461 U.S. 952 (1983), (P.App.21).

II. JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) seeking review of the decision of the Sixth Circuit filed April 27, 1988.

STATUTES WHICH THE CASE INVOLVES

42 U.S.C. § 1988

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their

---

[1] In this brief "P.App." denotes the appendix to the petition for certiorari.

vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statute of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

On January 17, 1978, the immediate action was brought by Mr. Stewart and another inmate of the Chillicothe Correctional Institute, Albert Reese. This action was brought pursuant to 42 U.S.C § 1983, (P.App.52). The action sought injunctive relief and a judgment declaring that the poiicies and practices of petitioners violated the respondent's constitutional rights, (P.App.54). Respondents contended that the action of the petitioners in banning "Hustler" magazine was arbitrary, capricious,

without any legal foundation and was based upon no valid evidence, (P.App.53).

Beginning in May, 1976, Respondents Stewart and Reese were denied permission to acquire "Hustler" magazine as a matter of policy of the Ohio Department of Rehabilitation and Corrections, (P.App.53). In December, 1976, the Ohio Department of Rehabilitation and Corrections adopted Administrative Regulation 5120-9-19 to replace A.R. 814. A.R. 5120-9-19 sets forth the criteria to follow in banning printed material from Ohio's prisons as well as the procedure to appeal such a determination.

At the time of the initiation of this action, A.R. 5120-9-19 had been in effect for approximately one year. In banning "Hustler", petitioners had failed to follow their own administrative regulations which provide procedural safeguards to protect the rights of inmates, (P.App.28, 29). Additionally, the petitioners failed to apply the procedural or substantive standards established by the courts for determining what printed material may be made available to inmates, (P.App.28). The district court entered judgment on April 2, 1981, (P.App.35). Specifically, the district court found that the petitioners had failed to apply procedural safeguards established by the courts and their own administrative regulations before determining what printed material could be available to inmates, (P.App.28, 29). Thus, any attempt by the inmates to appeal an arbitrary banning decision would have been fruitless since the petitioners did not even provide notice, an opportunity to be heard, or an ultimate determination on the question by a disinterested decision maker.

On April 17, 1981, Respondent Stewart moved for attorney's fees, pursuant to 42 U.S.C. § 1988. On June 3, 1981, the motion was granted and petitioners were ordered to pay $5,325.85, (P.App.27). This judgment was affirmed by the United States Court of Appeals for the Sixth Circuit on May 25, 1982, (P.App.23).

This Court granted a petition for writ of certiorari on May 31, 1983 and the judgment was ultimately vacated and remanded to the district court for reconsideration in light of *Hensley v. Eckerhart*, 461 U.S. 424, 76 L.Ed.2d 40, 103 S.Ct. 1933 (1983), (P.App.21). For a second time, the district court awarded Respondent Stewart $5,325.85 in attorney's fees, (P.App.15). Again, this decision was affirmed by the Sixth Circuit on April 27, 1988, (P.App.4).

ARGUMENT IN SUPPORT OF DENYING CERTIORARI

A. NO CONFLICT WITH DECISIONS OF THIS COURT

The opinion and order of the court of appeals and the district court are not in direct conflict with the decision in *Hensley v. Eckerhart*, 461 U.S. 424, 76 L.Ed.2d 40, 103 S.Ct. 1933 (1983) and *Hewitt v. Helms*, 482 U.S. ___, 96 L.Ed.2d 654, 107 S.Ct. 2672 (1987).

The definition of a prevailing party for the purpose of awarding attorney's fees was stated in *Hensley, supra*, and further refined by *Hewitt, supra*. As held by the Sixth Circuit, the definition of "prevailing party" and the facts of the case *sub judice* do not preclude a finding that

Respondent Stewart is a prevailing party and thus entitled to attorney's fees pursuant to 42 U.S.C. § 1988, (P.App.8-9).

This Court in *Hensley*, at 461 U.S. 433, stated that "Plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit."

This Court in *Hewitt*, further refined the definition of prevailing party for purposes of 42 U.S.C. § 1988. The Court in Hewitt held that a pronouncement by a court that the plaintiff had suffered a denial of due process did not constitute a sufficient relief to make the plaintiff a prevailing party. *Id.* at 661. This Court did go on to state in *Hewitt*, "[b]ecause of the defendant's official immunity he received no damages award." *Id.* "No injunction or declaratory judgment was entered in his favor." *Id.*

The district court has previously entered judgment holding that the petitioners did not provide procedural due process in deciding to ban "Hustler" (P.App.28), and that the petitioners also failed to follow their own administrative regulations in deciding whether "Hustler" was acceptable, (P.App.28, 29).

Pursuant to respondent's lawsuit and the district court's orders, the petitioners must now follow the administrative procedures outlined in A.R. 5190-9-19 (F) and (G) in providing procedural due process prior to classifying or banning "Hustler" magazine. Accordingly, Respondent Stewart has succeeded on a significant issue in this case which has achieved the benefit he sought in

bringing the suit. *See Hensley, supra*. Thus, he is entitled to an award of attorney's fees under 42 U.S.C. § 1988.

Accordingly, the decisions of the district court in the case *sub judice* are not in conflict with other decisions of this Court.

B. NO CONFLICT WITH OTHER CIRCUITS

Likewise, the decisions rendered in the immediate case are not in conflict with other federal courts of appeal. Petitioners assert the contrary and rely on the case of *National Coalition Against Abuse of Pesticides v. Thomas*, 828 F.2d 42 (D.C. Cir., 1987). The *Thomas* court held that merely obtaining a favorable declaration of the law does not suffice to qualify a claimant as a prevailing party. *Id.* at 44. The decisions in the immediate case do not conflict with the principle announced in *Thomas* and *Hewitt, supra*. Here, Respondent Stewart received more than a mere interlocutory order or declaration from the court. The judgment received by Respondent Stewart achieved a significant benefit sought in bringing the lawsuit. More importantly, the judgment received by Respondent Stewart compelled the prison officials to comply with constitutional due process as well as their own administrative regulations. Accordingly, petitioners claim that the decisions in the immediate case are in conflict with other courts of appeal is likewise without merit. The Sixth Circuit Court of Appeals has previously established that 42 U.S.C. § 1988 "should be liberally construed to achieve the public purposes involved in the congressional enactments." *Seals v. Quarterly County Court of Madison County*, 562 F.2d 396, 393 (6th Cir. 1977).

C. IMPORTANCE OF THE ISSUE

The district court has carefully reviewed the facts in the light of instructions from this Court and reached a conclusion the petitioners do not like. The Sixth Circuit Court of Appeals again reviewed the facts and concluded that they justified an award of attorney's fees consistent with this Court's instructions. The evaluation by the district court scarcely justified an appeal to the circuit court, let alone a review by this Court.

D. CONCLUSION

This case simply presents the spectacle of a sore loser trying to make litigation unaffordable by those who disagree with it. Twice the issue at bar has been before the District Court for the Southern District of Ohio, and twice respondent has prevailed. Twice the issue at bar has been before the Sixth Circuit, and twice respondent has prevailed. The courts below have properly applied the decisions of this Court, in opinions consistent with the other courts of appeal. Certiorari should be denied.

Respectfully submitted,

LYMAN BROWNFIELD
250 East Broad Street
Suite 1200
Columbus, Ohio 43215
(614) 221-5834

Attorney for Respondent

SUPREME COURT OF THE UNITED STATES

JAMES A. RHODES ET AL. *v.* LARRY STEWART

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 88-139. Decided October 17, 1988

PER CURIAM.

After entry of a judgment for the plaintiffs in a suit by two prisoners under 42 U. S. C. § 1983, the District Court for the Southern District of Ohio, Eastern Division, ordered the defendants to pay plaintiffs' attorney's fees pursuant to 42 U. S. C. § 1988. There is no entitlement to attorney's fees, however, unless the requesting party prevails; and by the time the District Court entered its judgment in the underlying suit one of the plaintiffs had died and the other was no longer in custody. In this posture, the plaintiffs were not prevailing parties under the rule we set forth in *Hewitt* v. *Helms*, 482 U. S. —— (1987), and the Court of Appeals for the Sixth Circuit erred in affirming the award of fees by the District Court.

I

On January 17, 1978, while in the custody of the Ohio Department of Rehabilitation and Correction, Albert Reese and Larry Stewart filed a complaint alleging violations of their First and Fourteenth Amendment rights by officials who refused them permission to subscribe to a magazine. On April 2, 1981, the District Court issued an opinion and an order, later amended in respects no longer pertinent to the case. The court ruled that correctional officials had not applied the proper procedural and substantive standards in denying the inmates their request, and ordered compliance with those standards.

Two months later, the District Court entered an award of fees in favor of the attorneys for Reese and Stewart in the amount of $5,306.25. The Court of Appeals for the Sixth

Circuit affirmed. We granted certiorari, vacated the judgment, and remanded the case to the Court of Appeals for further consideration in light of *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983). *Rhodes* v. *Stewart*, 461 U. S. 952 (1983). On remand from the Court of Appeals, the District Court confirmed its earlier award.

None of the opinions or orders cited thus far made reference to, or showed awareness of, two salient facts: Reese died on February 18, 1979; and Stewart, the sole respondent now before us, was paroled on March 15, 1978, and given a final release from parole on January 17, 1980. In consequence, when the District Court issued its original order on April 2, 1981, neither plaintiff was in the State's custody. For reasons that remain unexplained, the petitioners here did not raise this matter until their appeal of the District Court's order after remand.

A divided Court of Appeals upheld the award of fees, concluding that the mootness of the claim when the judgment was issued did not undermine respondent's status as a prevailing party eligible for attorney's fees. *Stewart* v. *Rhodes*, 845 F. 2d 327 (CA6 1988). In an unpublished opinion, the majority characterized the relief plaintiffs had received as declaratory relief. The panel majority noted our recent holding in *Hewitt* v. *Helms*, *supra*, that a plaintiff must receive some relief on the merits of his claim before he can be said to have prevailed within the meaning of § 1988. It observed, however, that the plaintiff in *Hewitt*, unlike Stewart, had not won a declaratory judgment, and concluded that the declaratory judgment issued in this case justified the granting of attorney's fees.

II

The Court of Appeals misapprehended our holding in *Hewitt*. Although the plaintiff in *Hewitt* had not won a declaratory judgment, nothing in our opinion suggested that the entry of such a judgment in a party's favor automatically

renders that party prevailing under § 1988. Indeed, we confirmed the contrary proposition:

> "In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces—the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*" 482 U. S., at —— (slip. op. 5) (emphasis in original).

A declaratory judgment, in this respect, is no different from any other judgment. It will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant towards the plaintiff. In this case, there was no such result. The lawsuit was not brought as a class action, but by two plaintiffs. A modification of prison policies on magazine subscriptions could not in any way have benefited either plaintiff, one of whom was dead and the other released before the District Court entered its order. This case is thus controlled by our holding in *Hewitt*, where the fact that the respondent had "long since been released from prison" and "could not get redress" from any changes in prison policy caused by his lawsuit compelled the conclusion that he was ineligible for an award of fees. 482 U. S., at ——. The case was moot before judgment issued, and the judgment therefore afforded the plaintiffs no relief whatsoever. In the absence of relief, a party cannot meet the threshold requirement of § 1988 that he prevail, and in consequence he is not entitled to an award of attorney's fees.

Certiorari is granted, and the decision of the Court of Appeals is reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

JAMES A. RHODES ET AL. *v.* LARRY STEWART

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 88–139. Decided October 17, 1988

JUSTICE MARSHALL, dissenting.

I continue to believe that it is unfair to litigants and damaging to the integrity and accuracy of this Court's decisions to reverse a decision summarily without the benefit of full briefing on the merits of the question decided. *Buckanan* v. *Stanships*, 485 U. S. ——, —— (1988) (MARSHALL, J., dissenting); *Commissioner* v. *McCoy*, 484 U. S. ——, —— (1987) (MARSHALL, J., dissenting); *Montana* v. *Hall*, 481 U. S. ——, —— (1987) (MARSHALL, J., dissenting).

The Rules of this Court urge litigants filing petitions for certiorari to focus on the exceptional need for this Court's review rather than on the merits of the underlying case. Summary disposition thus flies in the face of legitimate expectations of the parties seeking review by this Court and deprives them of the opportunity to argue the merits of their claim before judgment. Moreover, briefing on the merits leads to greater accuracy in our decisions and helps this Court to reduce as much as humanly possible the inevitable incidence of error in our opinions. Finally, the practice of summary disposition demonstrates insufficient respect for lower court judges and for our own dissenting colleagues on this Court.

It is my view that when the Court is considering summary disposition of a case, it should, at the very least, so inform the litigants and invite them to submit supplemental briefs on the merits. I remain unconvinced that this slight modification of our practice would unduly burden the Court. The benefits of increasing the fairness and accuracy of our decisionmaking and the value of according greater respect to our

colleagues on this and other courts more than outweighs any burden associated with such a modest accommodation.

I dissent.

SUPREME COURT OF THE UNITED STATES

JAMES A. RHODES ET AL. *v.* LARRY STEWART

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 88–139. Decided October 17, 1988

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, dissenting.

Because courts usually do not award remedies in cases that are moot, the novel legal issues presented here do not require this Court's plenary consideration, at least at this time. I therefore would just deny the petition for certiorari. Inasmuch, however, as the Court has chosen to grant the petition, I would give the case plenary consideration with full briefing and argument. Because I believe that summary reversal is inappropriate, I dissent.

The Court summarily reverses the Court of Appeals' judgment for being contrary to "our holding in *Hewitt* [v. *Helms*, 482 U. S. —— (1987)]," *ante*, at 2. That case clearly does not control here. In *Hewitt*, the plaintiff never obtained a "formal judgment in his favor," *id.*, at —— (slip op. 5), and the question there was whether he nonetheless could qualify as a "prevailing party," thereby making him eligible for attorney's fees under 42 U. S. C. § 1988. The Court ruled that he could not because nothing about his lawsuit changed the defendants' behavior towards him.

Here, however, respondent did obtain "a formal judgment in his favor," although he no longer was incarcerated at the time. Thus, this case presents the question whether to be a "prevailing party" it is enough to win one's lawsuit. *Hewitt* did not decide this question, nor could it have, since it did not concern a plaintiff who had obtained "all or some of the relief he sought through a judgment." 482 U. S., at —— (slip. op. 5).

The Court quotes a passage from *Hewitt* and construes it as stating that the entry of a declaratory judgment, without practical consequences, would not suffice for the purposes of § 1988. *Ante*, at 3. In context, however, this passage simply bolsters the Court's point about when a nonfinal "statement of law" in a judicial opinion may be deemed the functional "equivalent of declaratory relief" under § 1988. 482 U. S., at —— (slip op. 5). Indeed, it would be ironic if this passage purported to resolve a question not before the Court in *Hewitt*, as it extols the "judicial pronouncement" limited to resolving the particular "case or controversy" at hand rather than rendering an "advisory opinion" on a question not presented by the facts of the immediate dispute. *Ibid.* Thus, I believe that the *Hewitt* opinion was not meant to tell us, or the Court of Appeals, how to decide this case. But even if it did, I would not summarily reverse the Court of Appeals on this basis for the very reason that our own pronouncements lose their controlling authority when they attempt to decide questions not before the Court at the time.[1]

Quite apart from the Court's interpretation of *Hewitt*, I have doubts about its interpretation of the term "prevailing party" in § 1988. In ordinary usage, "prevailing" means winning. In the context of litigation, winning means obtaining a final judgment or other redress in one's favor. While the victory in this case may have been an empty one, it was a victory nonetheless. In the natural use of our language, we often speak of victories that are empty, hollow, or Pyrrhic. Thus, there is nothing anomalous about saying that respondent prevailed although he derived no tangible benefit from the judgment entered in his favor. Certainly the language

[1] See *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263, 272, 275 (1982) (dissenting opinion) (summary reversal is inappropriate when this Court's prior precedents do not "mandate" or "compel" reversal). See also *EEOC* v. *FLRA*, 476 U. S. 19, 26, n. 5 (1986) (STEVENS, J., dissenting) (this Court customarily reserves summary dispositions for settled issues of law).

of the statute does not so obviously compel a contrary conclusion as to warrant summary reversal.[2]

It is true that respondent here should not have obtained his judgment, since his case had become moot. But the fact that a party should not have "prevailed" ordinarily would not deprive him of attorney's fees.[3] Perhaps an exception should be made when the defect in the judgment goes to the court's jurisdiction, as mootness does, but the resolution of this issue is not obvious.[4] It surely is not one that should be decided without benefit of briefing and oral argument.

I dissent from the Court's summary disposition of this case.

[2] See *Ganey* v. *Edwards*, 759 F. 2d 337, 340 (CA4 1985) (plaintiff is entitled to attorney's fees simply because judgment was entered in his favor). In addition, other Courts of Appeals have held that a judgment of nominal damages suffices for § 1988. *E. g.*, *Skoda* v. *Fontani*, 646 F. 2d 1193 (CA7 1981); *Perez* v. *University of Puerto Rico*, 600 F. 2d 1 (CA1 1979).

[3] For example, if a defendant failed to raise a statute of limitations defense and the court entered a judgment for the plaintiff, and that judgment became final, I assume that the defendant later could not object to an award of attorney's fees on the ground that the plaintiff should not have prevailed because his claim was barred by the statute of limitations.

[4] Cf. *Garrity* v. *Sununu*, 752 F. 2d 727, 736, n. 8, 738 (CA1 1984) (an Eleventh Amendment issue not previously raised may not be used "to collaterally attack the court's judgment solely for the purpose of avoiding payment of the fees award") (footnote omitted).